STATE OF MICHIGAN

COURT OF APPEALS

HARRY J. HILL, JR.,

Plaintiff-Appellee,

v

IKON OFFICE SOLUTIONS, INC.,

Defendant-Appellant,

and

JEFFREY STONER,

Defendant.

UNPUBLISHED
December 7, 2006

No. 263147
Wayne Circuit Court
LC No. 01-117235-CK

Before: Cavanagh, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

IKON appeals as of right the final judgment entered in plaintiff's favor in this age discrimination and sales commission dispute following a nine-day jury trial. We affirm.

On appeal, IKON first argues that its motion for JNOV should have been granted with regard to plaintiff's age discrimination claim because plaintiff failed to present sufficient direct, indirect, or circumstantial evidence to support his claim. However, IKON has failed to provide this Court with the complete record on appeal as required under MCR 7.210(A)(1). In particular, IKON has neither provided the trial exhibits nor the transcript of the hearing on its motion for JNOV. See MCR 7.210(B)(1)(a), 7.210(C). Therefore, this Court may consider this issue abandoned or waived. See *Reed v Reed*, 265 Mich App 131, 160; 693 NW2d 825 (2005); *People v Wilson*, 196 Mich App 604, 615; 493 NW2d 471 (1992); *Nye v Gable, Nelson & Murphy*, 169 Mich App 411, 413-416; 425 NW2d 797 (1988). But, because our review is de novo, we will consider the issue with the caveat that our review is limited by the circumstances created by defendant, i.e., we do not have the benefit of the trial exhibits or the trial court's significant insight derived from presiding over this nine day trial, witnessing the testimony, and reviewing the trial exhibits.

Michigan employers may not discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of age. MCL 37.2202(1)(a). Proof of discriminatory treatment may be established by direct evidence or

by indirect or circumstantial evidence. *Sniecinski v Blue Cross Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003). Direct evidence is '"evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions."' *Id*. at 133, quoting *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001), quoting *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 926 (CA 6, 1999). Examples of direct evidence have included (1) racial slurs and derogatory remarks made by a decisionmaker, *Harrison v Olde Financial Corp*, 225 Mich App 601, 610; 572 NW2d 679 (1997), (2) statements by a decisionmaker such as, "If I have to, I will get rid of the older guys—you older guys and replace you with younger ones," *Downey v Charlevoix Co Bd of Rd Comm'rs*, 227 Mich App 621, 633; 576 NW2d 712 (1998), and (3) a supervisor's statement, "[You're] getting too old for this shit," made during the conversation in which he terminated the plaintiff, *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538-539; 620 NW2d 836 (2001). In other words, the contested remark is considered, as well as the context of the contested remark, to determine whether it constitutes evidence of defendant's discriminatory intent without need of inferences.

However, if there is not direct evidence of discriminatory intent, indirect or circumstantial evidence may be presented to establish an inference of discriminatory intent. The plaintiff must proceed using the analysis set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Sniecinski*, *supra* at 133. A rebuttable prima facie case of unlawful discrimination is created if the plaintiff presents evidence that (1) he belonged to a protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position, and (4) his failure to obtain the position occurred under circumstances giving rise to an inference of unlawful discrimination. *Id*. If the plaintiff establishes a prima facie case of discrimination,

> the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. If a defendant produces such evidence, the presumption is rebutted, and the burden shifts back to the plaintiff to show that the defendant's reasons were not the true reasons, but a mere pretext for discrimination. [*Id*. (citations omitted).]

Under both the direct and indirect evidence methods of establishing unlawful discrimination, the plaintiff must still prove a causal link between the discriminatory animus and the adverse employment action. *Id*. at 134-135.

Here, plaintiff appears to have argued that he presented both direct and indirect evidence of age discrimination. He offers as "direct evidence" his testimony that he was replaced, first on an account, and then completely, by younger females. Plaintiff also offers testimony that, after he was fired, plaintiff's boss referred to IKON as "his new dynamic organization." But, none of this evidence *requires* the conclusion that unlawful discrimination was at least a motivating factor in IKON's actions, if the evidence is believed. Replacement by a younger individual by itself is not sufficient, and the reference to a "dynamic organization" is facially neutral, neither implying youth nor implicating age. Thus, plaintiff's proffered "direct evidence" of IKON's discriminatory intent is without merit.

So, to have properly succeeded on his age discrimination theory using indirect or circumstantial evidence, plaintiff must have satisfied the *McDonnell Douglas* evidentiary

standard, i.e., that (1) he belonged to a protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position, and (4) his termination occurred under circumstances giving rise to an inference of unlawful discrimination. See *Hazle, supra* at 463 n 6 (the elements of the *McDonnell Douglas* prima facie case should be tailored to fit the factual situation at hand"). IKON does not dispute the first two elements; however, IKON claims that plaintiff was not qualified for the sales representative position because he was a thief.

This qualification requirement has been described as follows: "[a]n employee is qualified if he was performing his job at a level that met the employer's legitimate expectations." *Town v Michigan Bell Tel Co*, 455 Mich 688, 699; 568 NW2d 64 (1997). It is primarily to rule out the possibility that the employee was fired for inadequate job performance. *Id*. at 699 n 22. IKON does not reference case law to support its claim that allegedly stealing company property renders an employee unqualified within the context of a *McDonnell Douglas* analysis. It appears that the emphasis of the analysis is on actual job performance and qualifications, not such purported violations. See *Hazle*, *supra* at 469-470. Here, because plaintiff was a very successful salesperson for IKON for many years, and there was no evidence that his job performance was inadequate, it appears that plaintiff was "qualified" within the context of the *McDonnell Douglas* analysis. But, even if stealing company property did render plaintiff unqualified, it was an issue of fact for the jury whether plaintiff did, indeed, steal the property.

But, IKON argues that plaintiff also failed to meet the fourth requirement of the *McDonnell Douglas* test, i.e., that plaintiff's termination occurred under circumstances giving rise to an inference of unlawful discrimination. Considering the testimony and all legitimate inferences in the light most favorable to plaintiff, we disagree and conclude that there was sufficient evidence to create an issue for the jury. See *Attard*, *supra*.

There was evidence from which a jury could conclude that plaintiff's termination occurred under circumstances giving rise to an inference of unlawful discrimination. The evidence included that: (1) at least one of plaintiff's accounts, the U.S. Car account, was taken from plaintiff and given to a younger salesperson, (2) other salespersons were provided company perks such as company cars and credit cards, (3) plaintiff was replaced with a younger salesperson, (4) other ethical violations had occurred, of note is one involving a younger salesperson [so-called poaching on plaintiff's sales territory], without reprisal, (5) younger salespersons received more assistance from plaintiff's supervisor, Jeff Stoner, (6) plaintiff was denied some training and travel opportunities, (7) IKON had a progressive disciplinary program in place that began with a written warning but plaintiff did not receive one before he was terminated, and (8) IKON was not attempting to "down-size" the major account department of which plaintiff was a member at the time of his termination. Obviously, there could be other explanations for most if not all of these actions, as Stoner's testimony appears to imply, but it was for the jury to weigh the credibility of the witnesses and determine these issues of fact. Thus, plaintiff established a rebuttable prima facie case from which a jury could infer that plaintiff was subjected to unlawful discrimination.

But, IKON argues, even if plaintiff did establish a presumption of unlawful discrimination, it rebutted the presumption with a legitimate, nondiscriminatory reason for plaintiff's termination—plaintiff stole company property. Whether plaintiff "stole" company property was an issue of fact for the jury. But, plaintiff met his burden of showing that this purported reason for his termination was mere pretext for discrimination. Plaintiff proved, at

least, that (1) IKON knew he had the intention to purchase the copy machine for his chiropractor, (2) IKON knew where the machine was because it delivered it, (3) the proper paperwork for the transaction was completed, (4) IKON did not attempt to retrieve the copier for non-payment as it had in other instances of customer non-payment, (5) plaintiff was never asked to authorize a deduction from his paycheck for the copy machine as he had been in the past when he purchased other equipment, (6) plaintiff was never told that he would be fired if he did not pay for the machine before his commission payment disputes were resolved (plaintiff testified that he may have paid for the machine via one of the several unexplained deductions and charge-backs), and (7) IKON did not require that plaintiff pay for the machine after plaintiff's termination. In light of the evidence, the jury could have concluded that plaintiff did not steal the copy machine and that IKON was using this purported ethical violation as an excuse to terminate plaintiff because of his age.

In summary, plaintiff did not establish his age discrimination claim by direct evidence but he did create a rebuttable presumption using direct or circumstantial evidence from which a jury could infer that he was terminated because of his age. IKON rebutted the presumption with its claim that plaintiff was terminated because he stole company property, but plaintiff provided evidence from which a jury could conclude that IKON's proffered reason was a mere pretext for discrimination and that plaintiff was actually terminated because of his age. Accordingly, IKON's motion for JNOV with regard to this claim was properly denied.

Next, IKON argues that its motion for JNOV should have been granted with regard to plaintiff's unjust enrichment claim because there was an express contract covering the same subject matter and the jury concluded that plaintiff was not the procuring cause of sales after his discharge. However, as discussed above, IKON has failed to provide this Court with the complete record on appeal. See MCR 7.210(A)(1). Again, this Court may consider this issue abandoned or waived but, because our review is de novo, we will consider the issue under the same limiting circumstances identified above.

The jury verdict form in this case was completed as follows:

> **Question 1**: Was the Plaintiff the procuring cause of sales that were made by Defendant to General Motors *after* his termination?
>
> Answer: No [addressed in #5]
>
> * * *
>
> **Question 5**: Was Defendant unjustly enriched by the efforts of Plaintiff?
>
> Answer: Yes

And an award of $110,500 was rendered. After the verdict was read, the trial court questioned the jury about the notation associated with the answer to question number one. The foreperson explained that "the new employee got 18 percent" and plaintiff got 35 percent for the General Motors account. So, the jury subtracted 18 from 35 and got 17 percent. IKON received a profit of $1.3 million and the jury allocated as unjust enrichment the difference between the two commissions. The court asked "And so you didn't think that fit in with answer number 1, and

you thought it was better addressed in your answer to number 5?" The foreperson responded, "Right, because we didn't want to pay him twice for it. Another person said "You said we could only do it once." Then the foreperson continued, "So we thought it would be included in number 5 and just not even put it in number 1."

It appears then, that the jury rendered the disputed award by considering that both plaintiff and Stoner testified that IKON earned $1.3 million from its facilities management agreement with General Motors and plaintiff testified that he had worked on securing that agreement for years before his termination. It was undisputed that the agreement was actually signed after plaintiff's termination. So, the jury seems to have combined the procuring cause theory with the unjust enrichment theory. The confusion may not have been aided by the wording on the jury verdict form with respect to question five which does not reference a time frame to consider. In any case, defendant argues that the jury could not have rendered an unjust enrichment award in light of its acknowledgement of an express contract between IKON and plaintiff with respect to commission payments. IKON disingenuously argues that the jury concluded that plaintiff was not the procuring cause of the facilities management contract although, as discussed above, it is clear that the computations made by the jury to determine the award were based entirely on that contract.

A claim of unjust enrichment requires proof that the defendant received a benefit from the plaintiff and that permitting the defendant to retain the benefit would result in inequity to the plaintiff. *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). The law will imply a contract to prevent an unjust enrichment; but, if an express contract covering the same subject matter exists, no other contract will be implied. *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 328; 657 NW2d 759 (2002). If there are questions of fact concerning the existence and terms of the contract, a claim for unjust enrichment can be maintained. *Id*.

Defendant argues that, because the jury concluded that defendant breached its contract with plaintiff by using a commission percentage that was different than the commission percentage agreed to by the parties, resulting in $23,000 in damages, as a matter of law plaintiff could not succeed on his unjust enrichment claim. But, to arrive at its conclusion that plaintiff was entitled to $23,000 in damages, it appears that the jury relied on plaintiff's testimony that consisted of the following, in relevant part:

> Q. And assuming you were entitled to your 35 percent on all of the transactions with General Motors, did you add up the amount of money that you felt you had lost because the wrong commission was applied?
>
> A. Yes, I did.
>
> Q. And what did you come up with?
>
> A. Approximately 23 thousand dollars and change. [Tr IV, p 22.]

Thus, the jury's determination necessarily included the conclusion that this breach of contract occurred during plaintiff's employment at IKON.

The jury's unjust enrichment award would appear to derive from the fact that IKON

benefited from the facilities management contract that plaintiff had helped to secure before his termination, but which was actually consummated and became fruitful after plaintiff was terminated when, because of his termination, plaintiff did not have a contract with IKON. However, this is just one means of reconciling the jury's verdict; there are obviously other explanations. But, it clearly appears that the jury concluded that plaintiff's efforts in securing the facilities management contract with General Motors required compensation, even though he was terminated before the deal was actually consummated. In other words, whether through the procuring cause doctrine or through the unjust enrichment theory, the jury concluded that equitable considerations should prevail on this issue. There was sufficient evidence for the jury to conclude that IKON was unjustly enriched by plaintiff's efforts; thus, defendant's motion for JNOV with regard to this claim was properly denied.

Next, IKON argues that its motion for JNOV should have been granted with regard to plaintiff's claim that he was not paid the proper rate of commissions because the change of rate was in accordance with the parties' agreement. However, as discussed above, IKON has failed to provide this Court with the complete record on appeal. See MCR 7.210(A)(1). Again, this Court may consider this issue abandoned or waived but, because our review is de novo, we will consider the issue under the same limiting circumstances identified above.

IKON concedes that plaintiff was originally promised a 35 percent commission on all transactions with General Motors, but it claims that this commission rate changed and such change was evidenced by a written compensation program; therefore, the jury verdict of $23,000 should have been vacated. But, as plaintiff maintained throughout the trial, although the compensation program indicated a change in rate, it did not reference plaintiff's General Motors transactions, the rate of which had been establish through an oral contract. IKON did not refute that position with any admissible evidence.

In fact, although plaintiff's commission rate was allegedly reduced in 1999, it appears that the audit that was conducted used a rate of 35 percent with respect to various charge-backs and other deductions. However, as noted previously, this Court was not provided any of the trial exhibits, including the audit documents. But, plaintiff testified that the audit used a rate of 35 percent and IKON has not provided any evidence to the contrary. Accordingly, it appears that there was sufficient evidence for the jury to conclude that plaintiff was entitled to a 35 percent commission on General Motors transactions; thus, the trial court properly denied defendant's motion for JNOV premised on this ground.

Next, IKON argues that the trial court abused its discretion by admitting the testimony of Greg Ploch, which included that Ploch felt he had been subjected to discriminatory treatment while employed at IKON. After review for an abuse of discretion, we agree. However, reversal is not warranted.

First, we note that it appears that IKON acquiesced to having Ploch testify regarding his alleged discriminatory treatment, because defense counsel said, "[b]ring him in I cross examined him once I'll do it again and show the court there was no discrimination." A party may not obtain relief on appeal based upon an issue the resolution to which he or she acquiesced at trial. *Hilgendorf v St John Hosp & Medical Ctr Corp*, 245 Mich App 670, 683; 630 NW2d 356 (2001). However, before Ploch actually testified, defense counsel objected under MRE 401, 402, and 403. The trial court overruled the objection, holding that testimony of similar acts or

conduct was admissible.

MRE 402 provides that all relevant evidence is admissible, with limited exceptions. "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Here, IKON claims that Ploch's testimony about discrimination that he was allegedly subjected to while employed by IKON was irrelevant. It appears that the trial court's decision to admit the evidence was premised on a conclusion that such testimony may tend to show that IKON had a predisposition to discriminate based on age. This ruling may have been based on MRE 406 which provides that evidence of the routine practice of an organization is relevant to prove that the conduct of the organization on a particular occasion was in conformity with that routine practice. But, the firing of one other older person, even if the termination was because of his age, does not establish a "routine practice."

Plaintiff's claim was that he was terminated because of his age. Whether Ploch was terminated because of his age does not tend to establish that plaintiff also was terminated because of his age. However, "[o]ur courts are reluctant to overturn a jury's verdict, particularly if there is ample evidence to justify the jury's decision, and we will not do so on the basis of an erroneous evidentiary ruling unless refusal to take this action would be inconsistent with substantial justice." *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 295; 624 NW2d 212 (2001). In this case, there was ample evidence to justify the jury's decision, even without Ploch's short and relatively innocuous testimony. Although Ploch testified that he felt that he had been denied promotional opportunities because of his age, he also testified to a poor sales performance that led to his termination. Therefore, even if IKON did not acquiesce to the admission of this testimony, the testimony was of little evidentiary consequence in light of the other evidence justifying the jury's decision. Accordingly, no relief is warranted with regard to this issue. See MCR 2.613(A).

Next, IKON claims that the trial court improperly advised the jury that it could consider the existence of MCL 408.471 with regard to the motive and credibility of the witnesses because it gave the jury the impression that the court was vouching for plaintiff's credibility and effectively advised the jury that it was permissible to steal company property. We disagree.

Before the trial court read the jury instructions, it stated the following:

> All right, before we get into the instructions I want to give you a limiting instruction. And that is that there is a law in Michigan, that addresses the timing and procedure to recover retroactive wage deductions. However, it does not serve as a basis for any claim by the plaintiff against the defendant in this case.
>
> You're not allowed to consider this law as a factor in your disposition of liability or damages in this case. The fact of the existence of the law is only being offered for your consideration as to the motive or credibility of witnesses.

This is the instruction that IKON argues was prejudicial. It is unclear on what grounds the trial court relied upon to issue the instruction. However, MRE 105 provides that "[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or

for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

In this case, plaintiff repeatedly testified that IKON did not have the right to withhold his earnings for charge-backs and deductions that accrued over six months before such charge-backs and deductions were discovered. Plaintiff referenced a statute that provided the legal authority for his position. In essence, plaintiff was rebutting IKON's reason—that its audit revealed that plaintiff actually owed IKON almost $26,000—for not paying plaintiff the commissions to which he was entitled. The audit documents were admitted into evidence as exhibits. Plaintiff's counsel sought to have the statute admitted into evidence to support plaintiff's testimony and to discredit the trustworthiness of the audit. After the trial court denied the request, in accordance with IKON's objection that it would confuse the jury, plaintiff requested "acknowledgement by the court that there is such a statute as [plaintiff] has alleged and taking judicial notice of it in that regard." It appears that the trial court's action was a fair compromise.

The trial court could have taken judicial notice of the existence of the statute under MRE 202(a), which permits judicial notice of public statutes. The existence of the statute was relevant to facts in issue. It pertained to whether plaintiff had any good faith basis upon which to claim that IKON had illegally withheld certain charge-backs and deductions, thus justifying his failure to make full payment for the equipment IKON alleged was stolen. However, instead, the trial court merely advised that the statute existed and neither detailed the provisions of the statute nor explained its specific application with respect to this case. Contrary to IKON's argument on appeal, the instruction did not vouch for plaintiff's credibility or have the effect of condoning stealing to resolve disputes. IKON's audit information was admitted into evidence and the statute was plaintiff's only means of corroborating his testimony that the audit was not accurate or trustworthy.

In light of the fact that none of the statutory language was admitted into evidence, it is questionable whether its existence had any impact on either plaintiff's or IKON's credibility. In fact, it likely did not impact the jury's decision because the jury concluded that defendant did not breach its contract with plaintiff in the manner in which deductions were made from his commission and no damages were awarded on this claim. The trial court is entitled to some level of deference under the abuse of discretion standard of review if the decision to give or withhold a certain jury instruction depends on a factual determination, i.e., whether the evidence will support the instruction. See *Hilgendorf, supra*. IKON has not established that the failure to reverse for this purported instruction error would be inconsistent with substantial justice. MRE 2.613(A). Accordingly, relief is not warranted.

Next, IKON argues that the trial court abused its discretion when it denied its motion for new trial with regard to plaintiff's age discrimination claim because the jury verdict was against the great weight of the evidence. This issue is abandoned for failure to provide this Court with a copy of the transcript of the hearing on its motion for new trial in violation of MCR 7.210(A)(1), 7.210(B)(1)(a), 7.210(C). See *Reed, supra*; *Wilson, supra*; *Nye, supra*. Because an abuse of discretion standard applies to the issue whether the trial court improperly denied IKON's motion for new trial, it may not be reviewed. See MCR 2.611(F). Further, it appears for the reasons discussed above, that this issue is without merit.

Next, IKON argues that the trial court erred as a matter of law when it ruled that Section

3(R) of the Year 2000 Equipment Sales Compensation Manual was void pursuant to MCL 600.2961(8). Again, IKON's failure to provide a complete copy of the lower court record, including trial exhibits, stunts this Court's ability to review this issue. The lack of record, coupled with IKON's failure to clearly set forth what commissions were disputed with respect to this argument, almost precludes any thoughtful consideration of this issue. But, it appears that the commissions for which the disputed jury verdicts applied were not related to the General Motors facilities management contract, i.e., the procuring cause doctrine, but were related to other commissions that were earned and due, but were not paid after plaintiff was terminated. Plaintiff testified that he submitted commission statements in August, September, and October of 2000 that totaled $12,866.55, which had "hold" notations written on them and were never paid. The jury awarded plaintiff $14,990, as commission due on or after plaintiff's termination, of which $12,866.55 was intentionally withheld by IKON.

Apparently, this jury verdict is being contested on the ground that IKON was improperly precluded from arguing that, according to its contract with plaintiff, plaintiff was not entitled to any post-termination commissions. In particular, Section 3(R) of IKON's Year 2000 Equipment Sales Manual provided:

> R. Rep Termination
>
> Commission for deals booked but not paid at the time of the employee's termination will continue to be paid but not beyond the final day of the month following the month in which the employee terminates and only if the employee voluntarily terminates with written notice of at least one (1) week and returns all company property. No additional compensation shall be paid from date of termination.

Plaintiff argued that this section violated the Michigan Sales Representative Act, MCL 600.2961, which provides, in part:

> (4) All commissions that are due at the time of termination of a contract between a sales representative and principal shall be paid within 45 days after the date of termination. Commissions that become due after the termination date shall be paid within 45 days after the date of which the commission became due.

Other relevant sections of MCL 600.2961 provide as follows:

> (2) The terms of the contract between the principal and sales representative shall determine when a commission becomes due.
>
> (3) If the time when the commission is due cannot be determined by a contract between the principal and sales representative, the past practices between the parties shall control . . . .
>
> * * *
>
> (8) A provision in a contract between a principal and a sales representative purporting to waive any right under this section is void.

Plaintiff appears to have argued that, by law, plaintiff was entitled to receive commissions for sales that he earned but that became due after his termination, contrary to Section 3(R) of IKON's Manual. The trial court agreed that a sales representative could not be deprived of commissions that were earned during his employment but that became due after his involuntary termination; thus, Section 3(R) was void.

The construction and interpretation of contracts and statutes present questions of law that are reviewed de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003); *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). The goal of both is to determine and enforce the underlying intent of the contracting parties, and the Legislature, on the basis of the plain language of the contract and statute. See *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003); *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000).

Here, a plain reading of Section 3(R) indicates that only commissions for deals booked, but not paid, will be paid "but not beyond the final day of the month following the month in which the employee terminates" and only if the sales representative voluntarily terminates with written notice. It does not allow the payment of any commissions if a sales representative is involuntarily terminated, as was the case here. And, Section 3(R) does not indicate when a commission is "due." It appears from the testimony that commissions become "due" after the equipment is installed and paid for by the customer. IKON argues that "the terms of the parties' contract explicitly set forth the terms under which commissions would be due upon a sales representative's termination, and it is undisputed that Plaintiff did not satisfy those terms in order to be "due" a commission at the time of his discharge. It is undisputed that Plaintiff did not 'voluntarily terminate with written notice of at least one week and return[] all company property.'" Defendant seems to be implying that when a commission becomes "due" changes when a sales representative is terminated. But, the clear and unambiguous testimony of both plaintiff and Stoner indicated that a commission becomes "due" after the equipment is installed and paid for by the customer. But, whether "due" or not, under Section 3(R), commissions will not be paid to a sales representative who is fired. Conversely, MCL 600.2961(4) expressly provides that commissions that are "due" at termination must be paid within 45 days of termination and those that become "due" after termination must be paid within 45 days after the date on which the commission became "due."

In *Walters v Bloomfield Hills Furniture*, 228 Mich App 160; 577 NW2d 206 (1998), a case involving unpaid commission following termination, this Court held that, with regard to MCL 600.2961,

> A court must look to the object of a statute and the harm that it was designed to remedy and apply a reasonable construction that best accomplishes the purpose of the statute. The text of the statute indicates that the Legislature intended to ensure that sales representatives are paid the commissions to which they are entitled, especially where those commissions come due after the termination of the employment relationship. [*Id*. at 164.]

In this case, as the trial court noted, according to Section 3(R) of IKON's Manual, a sales representative could secure a sale and then, to insulate IKON from having to pay a large commission on the sale, IKON could fire the sales representative before the commissions

become "due." This seems to be exactly what the statute was designed to prohibit. In other words, commissions that are due—after the installation and payment of the sold equipment—at the time of termination must be paid within 45 days and those that become due—after the installation and payment of the sold equipment—following termination must be paid within 45 days of date the commission became due. See MCL 600.2961(4). IKON could not force plaintiff to waive this statutory right. See MCL 600.2961(8). Therefore, Section 3(R) of IKON's Manual was properly excluded.

Finally, IKON argues that the trial court abused its discretion when it denied IKON's motion for a new trial with regard to plaintiff's unjust enrichment claim because the jury verdict was against the great weight of the evidence. This issue is abandoned for failure to provide this Court with a copy of the transcript of the hearing on its motion for new trial in violation of MCR 7.210(A)(1), 7.210(B)(1)(a), 7.210(C). See *Reed, supra*; *Wilson, supra*; *Nye, supra*. Because an abuse of discretion standard applies to the issue whether the trial court improperly denied IKON's motion for new trial, it may not be reviewed. See MCR 2.611(F). Further, it appears for the reasons discussed above, that this issue is without merit.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra
/s/ Donald S. Owens